

UNITED STATES
v.
CARL H. MEYERS ET UX.

IBLA 74-168

Decided October 10, 1974

Appeal from a decision of Administrative Law Judge Rudolph M. Steiner, approving mineral patent application S-3866 in part and rejecting it in part and declaring certain portions of the Liberty Placer Mining Claims null and void.

Affirmed in part; reversed in part.

1. Mineral Lands: Determination of Character of--Mining Claims:
Mineral Lands--Mining Claims: Placer Claims

Even though there is a discovery on one 10-acre part of a placer claim, if any other 10-acre portion is nonmineral in character, that portion must be excluded from the patent. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and to justify expenditures to that end.

2. Evidence: Burden of Proof--Mineral Lands: Determination of Character of--Mining Claims: Determination of Validity--Mining Claims: Mineral Lands--Mining Claims: Placer Claims--Rules of Practice: Hearings

A finding that land is mineral in character may be wholly based on geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent

and experienced men would rely even though there is no physical exposure of the mineral on the claim. The acceptance of these kinds of less reliable evidence to support a determination that land is mineral in character distinguishes this test from the discovery standard approved in United States v. Coleman, 390 U.S. 599 (1968).

3. Evidence: Generally--Evidence: Weight--Mineral Lands: Determination of Character of--Mining Claims: Mineral Lands--Mining Claims: Placer Claims

Reports of mineralization prepared over thirty years ago will be given little, if any, weight where conditions on the land since the reports were made have changed in ways that affect the reliability of the reports.

4. Evidence: Burden of Proof--Mineral Lands: Determination of Character of--Mining Claims: Mineral Lands--Mining Claims: Placer Claims

Recovery of 100 ounces of gold from a 10-acre portion of a placer claim may establish the mineral character of that portion where it can be inferred from the record that sufficient additional economically recoverable gold is on that 10-acre portion.

5. Evidence: Generally--Mineral Lands: Determination of Character of--Mining Claims: Mineral Land

Where there is no demonstrated relationship in the record between the mineralization on adjacent patented mining claims and 10-acre portions of a placer claim, the inference that the minerals exist on the 10-acre portions is unwarranted.

APPEARANCES: Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for contestant; E. A. Hollingsworth, Esq., Reno, Nevada, for contestees.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On July 17, 1970, Carl and Sharon Meyers (contestees) filed patent application S-3866 for the Liberty Placer Claim in the E 1/2 NE 1/4 NE 1/4 NE 1/4, SE 1/4 NE 1/4 NE 1/4, S 1/2 SW 1/4 NE 1/4 NE 1/4, S 1/2 SE 1/4 NW 1/4 NE 1/4, NE 1/4 SW 1/4 NE 1/4, NW 1/4 SE 1/4 NE 1/4, NE 1/4 SE 1/4 NE 1/4, SE 1/4 SE 1/4 NE 1/4, SW 1/4 SW 1/4 NE 1/4, SE 1/4 SW 1/4 NE 1/4, SW 1/4 SE 1/4 NE 1/4 Sec. 9, T. 25 N., R. 9 E., M.D.M., Plumas County, California. ^{1/} In response to this application, the Bureau of Land Management (BLM) determined that there was a discovery on the NE 1/4 SW 1/4 NE 1/4, but that the remainder of the claim was nonmineral. On May 17, 1972, BLM, on behalf of the U.S. Forest Service, Department of Agriculture (contestant), filed a contest complaint against the parts of the Liberty Placer Claim named above except for the NE 1/4 SW 1/4 NE 1/4, charging that there is an insufficient quantity of mineral subject to the mining law on this land to justify extraction expenditures and that the lands are nonmineral.

In a decision dated November 20, 1973, Administrative Law Judge Rudolph M. Steiner found, based on the contestees' recovery of significant gold values from the stream bed and adjacent gravel deposits, that the NW 1/4 SE 1/4 NE 1/4 is mineral in character. He also found that the remainder of the claim was nonmineral in character and declared the nonmineral portions null and void.

The contestant, within the time permitted by the regulations, filed a notice of appeal to that portion of the decision which found that the NW 1/4 SE 1/4 NE 1/4 was mineral in character. On March 8, 1974, the contestees filed a "Notice of Cross Appeal" and request for time to respond to contestant's statement of reasons. That request and a later request were granted. They filed a "Statement of Reasons for Cross Appeal and Response to Contestant's Statement of Reasons for Cross Appeal and Response to Contestant's Statement of Reasons for Appeal" on June 3, 1973. The contestant argues that the contestees' cross appeal was not timely filed and that consequently, we cannot inquire into matters raised in the cross appeal.

^{1/} A placer mining location may be made for less than 10 acres where the claim is surrounded by prior locations. 43 CFR 3842.1-5. Here, the prior location of the Oakland patented claim restricts both the S 1/2 SE 1/4 NW 1/4 NE 1/4 and the S 1/2 SW 1/4 NE 1/4 NE 1/4 to five-acre parcels. The Oak Flat claim similarly restricts the E 1/2 NE 1/4 NE 1/4 NE 1/4. References to 10-acre parcels in this decision should be understood to also refer to these three five-acre parcels.

It is provided in 43 CFR 4.411 that a notice of appeal to the Board of Land Appeals will be dismissed where it is not transmitted within the 30-day period following service of the decision from which an appeal is being taken. Margaret Chicarello, 9 IBLA 124 (1973). Contestees' notice of cross appeal, filed after the 30-day period permitted by the regulations is not the source of jurisdiction for this Board to consider the case. However, the notice of appeal filed by the contestant was filed on time and this Board has jurisdiction to decide the case. Once the Board has jurisdiction over a case, it is not precluded from reviewing the entire record to determine whether, and to what extent, rights have been earned under the public land laws. United States v. Nelson, 8 IBLA 294, 296 (1972), aff'd, Nelson v. Morton, Civ. No. A-3-73 (D. Alas. Jan. 8, 1974), appeal docketed, 9th Cir., February 28, 1974; United States v. Grediagin, 7 IBLA 1, 4 (1972); Clare Williamson, 75 I.D. 338, 342-43 (1968). We will review the entire record here.

[1] A discovery on one 10-acre portion of an association placer mining claim does not establish the mineral character of the entire claim. Even though there is a discovery on one 10-acre portion, if any other 10-acre part is nonmineral in character, that part or parts of the claim must be excluded from the patent. 30 U.S.C. § 36 (1970); United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972); United States v. Bunkowski, 5 IBLA 102, 127, 79 I.D. 43, 55 (1972); American Smelting & Refining Co., 39 I.D. 299 (1910).

An early departmental decision discussed the rationale for inquiring into the mineral character of the remainder of a placer mining claim after a discovery had been made on one portion of the claim.

It is contended * * * that a discovery of placer mineral deposits will support a location of twenty acres by a single individual or one hundred and sixty acres by an association of eight persons whether the mineral deposits extend throughout the entire claim or are confined to the immediate locality of the discovery.

* * * * *

Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery

is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is discovered in any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of non-mineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these claimants were sustained.

Ferrell v. Hoge, 29 I.D. 12, 13, 15 (1889). The rationale is still true today. The litigation here is to determine whether any of the subdivisions must be excluded from the patent to be issued because they are nonmineral lands.

[2] Land is mineral in character when known conditions engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and to justify expenditure to that end. Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 240 (1914); United States v. McCall, supra at 27, 79 I.D. at 460; United States v. Bunkowski, supra at 127, 79 I.D. at 55. Two elements must be shown under this test: (1) the quantity and quality of minerals on the claim; and (2) the prospect of success in removing, extracting and marketing the mineral. Unlike in those cases where discovery is an issue, Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1970), in a mineral character determination the quantity and quality of mineral on a claim may be established without the physical exposure of the mineral on the claim. A finding that land is mineral in character may be based wholly on inferential evidence: geological conditions; discoveries of minerals in adjacent land; and other observable external conditions upon which a prudent and experienced person would rely. Southern Pacific Co., 71 I.D. 224, 233 (1964); United States v. Tobiassen, 10 IBLA 379, 383-84 (1973). The acceptance of these kinds of less reliable evidence to support a determination that land is mineral in character distinguishes this test from the discovery standard approved in United States v. Coleman, 390 U.S. 599 (1968). The mining claimant has the burden of showing by a preponderance of the evidence that the land is mineral in character. United States v. McCall, supra at 27, 79 I.D. at 460; United States v. Bunkowski, supra at 127, 79 I.D. at 55.

[3] Before considering the evidence at the hearing we must rule on an evidentiary problem. The contestant has renewed an objection it made at the hearing to the admission of Exhibits B, C, D, E, F, and H, on the grounds they are inadmissible hearsay. Five of the exhibits listed above are mining reports and letters prepared between 1911 and 1942 which describe the prospects of mining the Liberty Placer claim. The sixth, Exhibit H, purports to be a summary of newspaper accounts published in 1870. Neither the Administrative Procedure Act, 5 U.S.C. § 556(d) (1970), nor departmental regulations or cases, Casey Ranches, 14 IBLA 48, 54-55, 80 I.D. 777, 779 (1973), bar the admission of hearsay evidence in an administrative hearing. The admission of the exhibits was not improper. Counsel's objections are pertinent, on the other hand, to the weight that can be given these exhibits. The exhibits tend to show that at the time the reports were made there were valuable mineral deposits on the Liberty Placer claim. There was no testimony at the hearing that conditions then prevailing still exist. To the contrary, there was testimony that the property had been mined since that time (Tr. 41, 71-72, 85). Because conditions on the claim have changed since the reports were made and because over 30 years has passed since the most recent report, the reports are extremely unreliable indicators of present conditions. The old reports are not the type of evidence on which a prudent and experienced person would rely, and may be given little, if any, weight. We give them minimal weight.

There was no evidence presented by contestant showing any values of the land within the Liberty Placer claim at this time for purposes other than mining. The Liberty Placer claim is surrounded on three sides, the north, south and west, by patented mining claims. Two of these claims, the Riverside and the Oakland, were purchased by the contestees in the 1960's. These claims have not been mined productively in recent years. The Indian Creek bisects the NE 1/4 SW 1/4 NE 1/4, the clear listed portion of the claim, from west to east, turns sharply south and meanders through portions of the NW 1/4 SE 1/4 NE 1/4, SW 1/4 SE 1/4 NE 1/4 and the SE 1/4 SW 1/4 NE 1/4. State Highway No. 89 runs parallel to and west of Indian Creek.

The contestant's appeal focuses on the 10-acre portion directly east of the clear listed area of the claim, namely, the NW 1/4 SE 1/4 NE 1/4, which the Judge found to be mineral in character. The Judge based his finding that this subdivision is mineral in character on the contestee's testimony that he recovered significant amounts of gold from the stream bed in this area by suction dredging and skindiving. In response to this, the contestant argues that the finding is incorrect because the gold in this area has been exhausted. We do not agree. Carl Meyers, one of the contestees, testified that he removed approximately 100 ounces of gold from this area (Tr. 104-05), by skindiving and suction dredging and stopped operations only because of the

advent of cold weather (Tr. 83-85). He also testified that he had worked only a portion of this area and that crevices with potentially higher gold values than that already recovered existed in the area.

Contestant quotes a finding by the Judge on page 4 of his decision,

There is a strip of gravel 30 feet wide, 1200 feet long, and 4 to 5 feet in depth exposed on the West side of the NW 1/4 SE 1/4 NE 1/4. Tr. 77.

and states that it is a misrepresentation of the evidence, observing that a 10-acre parcel is but 660 feet long, and that "the portion of Indian Creek bordering on this disputed subdivision can at most have a length of about 330 feet." The statement by the Judge is supported by the record. Contestant's reasoning is incorrect because it ignores the possibility that the gravels may continue into another portion of the claim or that even with the length of the gravel being misstated by the witness, the land would still be mineral land.

The contestant also alleges that the Judge overstated the area of the creekbed available for mining by .18 acres. Even though this assertion is true, there are still sufficient unworked gravels in the NW 1/4 SE 1/4 NE 1/4 to support a finding that the land there is mineral land. We affirm the Judge's finding that the NW 1/4 SE 1/4 NE 1/4 is mineral in character for the reasons above stated.

[4] The contestees assert that the Judge incorrectly found the remainder of the claim nonmineral in character. With only one exception, we agree with the Judge. The exception is the S 1/2 SE 1/4 NW 1/4 NE 1/4, a five-acre parcel directly to the north of the clearlisted area. Patented mining claims abut this parcel to the north and west. The gold-bearing gravels on the clear listed area are located on or near the S 1/2 SE 1/4 NW 1/4 NE 1/4 and appear to extend into that five-acre parcel (Tr. 43, Ex. 1). Certainly the inference that it does is properly drawn. In addition, in the northern-most trench on the 5-acre tract, Meyers testified that one sample taken in that area indicated values of \$ 10 per cubic yard (Tr. 110), and other sampling also indicated gold values (Tr. 67). The presence of all these factors in combination is sufficient to engender the belief that this five-acre section is mineral in character even though there is insufficient exposure of minerals to justify the finding of a discovery. We find that the S 1/2 SE 1/4 NW 1/4 NE 1/4 is mineral land.

Although there are some differences in the proof available to show that the remaining 10-acre parcels are mineral lands, the proof

for each is essentially similar. Limited sampling has revealed generally low gold values (i.e. from nothing to \$.35 per cubic yard) and only small isolated pockets of potential gold-bearing values. These values are in stark contrast to high values found on the clear listed portion or to the recovery of 100 ounces of gold on the parcel the Judge declared mineral in character. The stream below the bend from the center of the clear listed area to the south is almost entirely devoid of gravel (Tr. 25). The finding of traces of gold or low-grade gold-bearing gravels in limited quantities does not demonstrate, without more, that land is mineral in character. Etling v. Potter, 17 L.D. 424 (1893); see United States v. Bradlaner 13 IBLA 184 (1973). This is insufficient direct evidence to show that these parcels are mineral. The indirect evidence is also very weak.

[5] The Liberty Placer claim is surrounded by patented mining claims. There is no evidence, in general, that shows how or where mining operations were conducted on the mining claims. There is no way, therefore, to extend the values on the patented claims to most of the parcels of the claim in question including the E 1/2 NE 1/4 NE 1/4 NE 1/4, SE 1/4 NE 1/4 NE 1/4, NE 1/4 SE 1/4 NE 1/4, SE 1/4 SE 1/4 NE 1/4, SW 1/4 SW 1/4 NE 1/4, SE 1/4 SW 1/4 NE 1/4. The combination of proven values in one area plus application of geological principles and techniques that show similar conditions in an adjacent area can give rise to the inference that the adjacent area is mineral in character. Based on the record, there is no demonstrated relationship between the mineralization on the patented claims and the portions of the Liberty Placer claim listed above. The inference that minerals continue into these portions of the Liberty Placer claim cannot properly be drawn. We find that these lands are nonmineral.

For the remaining areas of the claim, the S 1/2 SW 1/4 NE 1/4 NE 1/4, and SW 1/4 SE 1/4 NE 1/4, the Judge found that a "buried channel" runs through these claims, commencing in the patented Oakland claim to the north and terminating in the patented Riverside claim to the south, but that the belief engendered by the old mining reports that the minerals in the channel could be profitably extracted was "negated by the fact that the caved tunnels have lain undisturbed for more than thirty years" (Dec. at 8). The contestees argue that:

Such a conclusion leads one to wonder where the judge spent the last 30 years of his life. Anyone remotely conversant with the status of placer mining or lode mining for gold must know that rare indeed is the mining operation conducted solely for the recovery of gold. Since the gold mines were closed by Executive Order at the beginning of World War II until

very recently with the advent of increased gold prices, very few gold mines have been opened. Even with gold prices, very few gold mines have been opened. Even with gold prices almost five times what they were three years ago, investors still are proceeding cautiously in light of unstable market conditions, environmental consideration, governmental interference at all levels and numerous other factors, all of which are matters susceptible of judicial notice (or its administrative counterpart) by the judge. It is absolutely incredible that anyone, much less a judge, can negate such strong evidence of mineral value merely because the owner of the deposit elected not to rehabilitate the old workings which he should know, if he knows anything about drift mining, would be but an exercise in futility. Drift mine workings are dangerous enough when first opened. Attempting to mine old workings of this nature is tantamount to suicide.

This argument does not dissuade us from agreeing with the Judge. Some of the points raised in the argument depend on facts neither in the record, nor capable of official notice. In addition, the statements do not support the claim that the land is mineral in character. Counsel stated that drift mining or opening of old workings is futile and tantamount to suicide. Such assertions hardly support the belief that the minerals in the channel can be removed, marketed and extracted at a profit. The Judge's inference is supported by the record. See United States v. Barrows, 76 I.D. 299, 306 (1968), aff'd, 447 F.2d 80 (9th Cir. 1971). (Where failure to develop minerals after location gave rise to a presumption that the value of the minerals is not sufficient to justify the expenditure required to extract and market them.)

We also agree with the Judge's conclusions for another reason. The mining reports indicate that this tunnel, at one time, contained substantial mineral deposits. As we said before, however, the reports are not reliable evidence of whether the claims now contain valuable minerals. There is evidence in the record that mining operations were conducted on the Liberty Placer claim after the reports were prepared. It is possible that any values that were once in the buried channel have been mined out. No showing has been made that would engender the belief that there still exists in these parcels through which the channel runs mineral of such quantity and quality as to render its extraction profitable and justify expenditure to that end. See United States v. Dodson, A-27905 at 6 (July 31, 1959); Central Pacific Railway Co. v. Mullin, 52 I.D. 573, 575 (1929). These parcels are not now known to be mineral in character.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's finding that the S 1/2 SE 1/4 NW 1/4 NE 1/4 section 9, T. 25 N., R. 9 E., is nonmineral in character is reversed; the remainder of the decision is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Douglas E. Henriques
Administrative Judge

